SUPREME COURT, U. S.

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1171

NAPOLEON C. GABRIEL, ET AL.,

Petitioners,

v.

BETTY LEVIN, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted by all respondents (plaintiffs and defendants below) in opposition to the petition for certiorari of Napoleon C. Gabriel and Michael Moumousis. That portion of the brief dealing with the allowance of fees (Point II, below) is submitted only on behalf of plaintiffs, since defendants take no position on the subject.

The Decisions Below

This stockholders' representative and derivative action was brought by Class B stockholders of defendant Missouri Pacific Railroad Company ("MoPac") mainly to compel the payment of greater dividends on the B stock. The Dis-

trict Court for Southern New York, Weinfeld, J., approved the settlement of the action by judgment of May 2, 1973 (A. 367, 389);* the Second Circuit affirmed on Judge Weinfeld's opinion (A. 401); and this Court denied certiorari and rehearing (A. 402, 419). *Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y.), *affirmed* on opinion below sub nom. *Wesson* v. *Mississippi River Corp.*, 486 F. 2d 1398 (2d Cir.), *cert. denied* sub nom. *Wesson* v. *Levin*, 414 U.S. 1112 (1973), rehearing denied, 415 U.S. 939 (1974).

The settlement was also approved by the Interstate Commerce Commission (A. 420, 513) and by overwhelming majorities of both classes of MoPac's stock (A. 437-39). It was fully consummated in January 1974 (A. 142).

The present petition seeks review of three post-settlement decisions of the District Court (A. 65, 86, 165), all three affirmed by the Second Circuit (Pet. A1):

1. In November 1973 petitioner Moumousis moved to set aside the May 2 judgment approving the settlement, purportedly on the ground of newly discovered evidence (A. 1 et seq.). Judge Weinfeld's unreported decision of December 5, 1973 denied the motion (A. 65).

2. In February and March 1974 petitioner Gabriel moved to modify or set aside the judgment on jurisdictional grounds (A. 70, 72). Judge Weinfeld's unreported decision of April 8, 1974 denied the motions (A. 86).

3. In March 1974 plaintiffs and their counsel applied for the allowance of legal fees and expenses (A. 90, 109). Judge Weinfeld's decision of June 26, 1974 (A. 165) granted the applications except for a reduction in amount, *Levin* v. *Mississippi River Corp.*, 377 F. Supp. 926 (S.D.N.Y. 1974).

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* "A." refers to the Appendix below.

Upon petitioners' appeals, the Second Circuit affirmed the three decisions from the bench, *Levin* v. *Mississippi River Corp.*, 508 F. 2d 836 (2d Cir. 1974); Pet. Al. The present petition followed.

To avoid undue length of presentation, we respectfully refer to the decisions below (A. 165, 367) for a detailed narrative of the facts.

Counter-Statement of the Questions Presented

1. Are petitioners' attacks on the settlement barred by its judicial approval?

2. Did the District Court abuse its discretion in the award of fees by taking into account the services of some of plaintiffs' counsel in an earlier related action, which the Court found to have been "the basis and hard core of this litigation"?

3. Is the fee award premature?

REASONS FOR DENYING THE WRIT

POINT I

Petitioners' attacks on the settlement of this action are barred by the judgment approving the settlement.

The bulk of the petition asks this Court to review the validity of the settlement. Petitioners simply ignore that this issue is barred by res judicata. After a full hearing (A. 245) on notice to all of MoPac's stockholders (A. 389-90), the District Court approved the settlement by its judgment of May 2, 1973. A Class B stockholder, William R. Wesson, appealed from the judgment; he was repre-

sented by the same Gerard M. Carey, Esq., who now appears as attorney for these petitioners. The Second Circuit affirmed the judgment. Mr. Carey (still on behalf of Wesson) applied for certiorari and, when that was denied, applied for rehearing, again unsuccessfully. In these proceedings, Mr. Carey advanced precisely the same arguments that he now invokes in his new role as attorney for the present petitioners. Not a single fact has been added that was not before this Court and the Court of Appeals in the *Wesson* proceedings. Since Wesson's attack on the settlement was held not to merit review by this Court, the present petition—additionally burdened as it is by the bar of res judicata—is *a fortiori* unmeritorious.

We briefly review petitioners' individual points.

1. Petitioners contend that the settlement could not properly provide for a recapitalization of MoPac because the complaints did not ask for that relief. The same contention was advanced and overruled in connection with the approval of the settlement (see 59 F.R.D. at 367 n. 38). But even if the point were still open, it would be untenable; court-approved settlements frequently call for a consideration not sought and not obtainable under the complaint.*

2. Petitioners contend that the settlement was unfair because, under its terms, the equity of the Class B was reduced from 65% to 25% and because the Class B stock, allegedly worth $22,500 or more per share, was exchanged

* Thus, in *Masterson* v. *Pergament*, 203 F. 2d 315, 335 (6th Cir.), *cert. denied*, 346 U.S. 832 (1953), the settlement consideration included a guaranty by one of the defendants of a bank loan to the corporation, and a sale by the corporation to another defendant of machinery at a price in excess of recoverable value. In *Levey* v. *Babb*, 39 Misc. 2d 648, 241 N.Y.S. 2d 642 (Sup. Ct. 1963), the directors of a parent company exchanged, as part of a settlement, their 50% stock interest in the subsidiary for minority stock in the parent.

for cash and new stock worth $2,450. Again this contention was considered and overruled upon approval of the settlement, by the District Court (59 F.R.D. at 367-372), the Court of Appeals (A. 401), and the ICC (A. 420, 513). Even if the point were still open, the valuation of the Class B stock would present an issue of fact hardly warranting review by this Court.

3. Petitioners contend that the recapitalization of MoPac took their property without due process of law and that neither the Court nor plaintiffs had the right or power to compel a recapitalization. This is but a rehash of the first two points. Moreover, under the Settlement Agreement, the recapitalization required, and received, stockholder approval in accordance with the applicable Missouri law; in addition, it required, and received, the votes of the minority stockholders of each class (A. 211, 219, 437-39). Petitioners cannot complain of a recapitalization effected in accordance with the applicable state law and the wishes of large majorities of the stockholders.

4. Petitioners contend that, under the rule of *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), the District Court lacked jurisdiction of the claims of those stockholders whose interest did not exceed $10,000. The point was raised in Mr. Wesson's petition for rehearing of his application for certiorari (A. 409-410), which this Court denied (A. 419). The same point could also have been raised when the approval of the settlement was before the District Court.* It is now foreclosed.

In any event, the District Court had clear and complete jurisdiction of this action, of the settlement, and of the

* This Court's decision in *Zahn* is, of course, not newly discovered evidence. It is not even new law; see *Zahn* v. *International Paper Co.*, 469 F. 2d 1033 (2d Cir. 1972), which had been decided prior to the settlement hearing herein.

claims of all Class B stockholders, regardless of the amount of their individual interest. This Court's decision in *Zahn* dealt only with "spurious" class actions under subdivision (b)(3) of Rule 23; in this type of suit the claims of the class members cannot be aggregated because they are "separate and distinct" (414 U.S. at 296, 300, 301). The present action was declared to be a class suit under subdivisions (b)(1) and (b)(2)—not (b)(3)—of Rule 23 (A. 176-178). It was, therefore, not a "spurious", but a "true" or "genuine" class action. The claims of the Class B stockholders to the declaration of greater dividends were not "separate and distinct", but "joint or common"; for "A stockholder suing to compel the corporation to declare a dividend is enforcing a right common to himself and the other stockholders against the corporation * * *;" *Doherty* v. *Mutual Warehouse Co.*, 245 F. 2d 609, 612 (5th Cir. 1957). In a class suit to enforce a joint or common right of the class members, aggregation of their claims is proper; *Berman* v. *Narragansett Racing Ass'n*, 414 F. 2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

Moreover, the District Court had jurisdiction regardless of the jurisdictional amount. The amended complaint herein alleged a claim under § 10(b) of the Securities Exchange Act, 15 USC § 78j(b) (A. 200-201). Jurisdiction of this statutory claim did not depend on the presence of the jurisdictional amount, § 27 of the Exchange Act, 15 USC § 78aa. An express allegation predicating federal jurisdiction upon these provisions was unnecessary; see Official Form 2(c) appended to the Federal Rules of Civil Procedure.

The rule of the *Zahn* case is, therefore, inapplicable to the case at bar. The District Court properly so held (A. 86).

5. Petitioners contend that plaintiff Alleghany Corporation was not a proper class representative because

its tax interests were allegedly different from, or opposed to, those of the other Class B stockholders. The same contention was considered and overruled upon approval of the settlement (59 F.R.D. at 371-72). Moreover, as the District Court took pains to point out, the interests of the Class B stockholders other than Alleghany were fully and adequately protected by plaintiffs Betty Levin and Robert LeVasseur and their counsel (59 F.R.D. at 366-67).

According to petitioners, Alleghany's supposedly adverse interest arose from the fact that the MoPac Class B stock it owned was held in a voting trust subject to supervision by the ICC. Both the trusteeship and the ICC supervision were, however, fully revealed at and before the settlement hearing,* so that they cannot now be invoked as newly discovered evidence (A. 65).

Petitioners' attacks on the settlement are frivolous and present no questions deserving review by this Court.

POINT II

The District Court's award of fees and expenses to plaintiffs and their lawyers was legally correct and presents no question inviting review by this Court.

Pursuant to its broad equitable powers, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and in ac-

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* The Settlement Agreement recited that, "pursuant to order of the Interstate Commerce Commission, the Class B stock beneficially owned by Alleghany is held by Franklin National Bank ('Franklin') as voting trustee * * *" (A. 210).

Long before, in connection with Alleghany's motion to intervene in the action, it had submitted copies of the voting trust agreements, which referred at length to the ICC orders. See affidavit of Granville Whittlesey, Jr. of April 29, 1968, to which copies of the voting trust agreements were annexed.

cordance with the terms of the settlement (A. 206-07, 233), the District Court awarded legal fees and expenses to plaintiffs and their counsel, payable by MoPac and its co-defendant, Mississippi River Corporation ("MRC") (A. 165; 377 F. Supp. 926). The Court of Appeals affirmed. Petitioners do not question the power of the District Court or the soundness of the exercise of its discretion. Their attacks on the awards are limited to three narrow legal questions. None of them has substance.

1. According to petitioners, the award to counsel for plaintiffs Levin and LeVasseur should not have taken into consideration the services these lawyers had rendered in the so-called "voting rights litigation". That litigation, described in the decisions below (A. 372-73, 170), was brought in 1963 to enjoin a merger plan of MoPac, which was allegedly designed to eliminate the Class B stock and give its equity to the Class A. This Court's decision, *Levin* v. *Mississippi River F. Corp.*, 386 U.S. 162 (1967), finally determined that the merger plan required separate approval by the Class B. Since that approval could not be obtained, MoPac abandoned the plan.

Plaintiffs could bring the present suit for greater dividends on the Class B stock only because the voting rights action kept the Class B stock in existence. What is more, this Court's 1967 decision established the strategic position of the Class B by sustaining its right to veto any merger or consolidation of MoPac. The successful prosecution of the voting rights litigation was thus, as Judge Weinfeld held, "the basis and hard core of this litigation" and "was a principal factor in bringing about the settlement" (A. 170).

In circumstances such as these, it is thoroughly settled that the allowance in a class or derivative suit may include services rendered in a prior action, provided it is suffi-

ciently related to the ultimate recovery. *Angoff* v. *Goldfine*, 270 F. 2d 185 (1st Cir. 1959); *Honda* v. *Mitchell*, 419 F. 2d 324 (D.C. Cir. 1969); *Paris* v. *Metropolitan L. Ins. Co.*, 94 F. Supp. 792 (S.D.N.Y. 1947); *Chapman* v. *United States*, 314 F. Supp. 549, 556 n. 7, 561 (C.D. Cal. 1970).

Petitioners do not even attempt to rebut the intimate connection, found by Judge Weinfeld, between the present suit and the voting rights litigation. Nor do they question the soundness of *Angoff* v. *Goldfine, supra,* and similar cases. Their attack on this aspect of the fee award is thus completely baseless.

2. Equally groundless is petitioners' contention that an award for services in the voting rights litigation is barred by res judicata. The successful lawyers in that case sought a fee award *against MoPac,* but the Eighth Circuit refused it, *Missouri Pac R. Co.* v. *Slayton,* 407 F. 2d 1078 (8th Cir.), *cert. denied,* 395 U.S. 937 (1969). The Court of Appeals recognized that "the Class B stockholders obtained a very substantial benefit from the litigation" (p. 1081); but the plaintiffs' rights against the Class B stockholders were not before the Court (p. 1082); and any benefit to MoPac was held to be only incidental and too insignificant to support an allowance against MoPac (p. 1083).

It is thus plain that the Eighth Circuit's decision was not intended to foreclose petitioners from seeking an allowance against the Class B, and Judge Weinfeld so held (A. 170-71). For purposes of the present settlement, the fee obligation of the Class B stockholders has been assumed by MoPac and MRC (A. 207, 233). Neither the obligation of the Class B nor its assumption by MoPac and MRC is affected by the decision of the Eighth Circuit.

3. Petitioners contend that the fee award was premature. The settlement agreement provided, however, that

plaintiffs were to apply for the allowance of fees and expenses "[a]fter the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal" (A. 233). The final judgment approving the terms of the settlement was entered on May 2, 1973 (A. 389-91). Upon affirmance by the Second Circuit and the denial of certiorari and rehearing by this Court (the latter on February 19, 1974, A. 419), the judgment was "no longer subject to appeal". The time for allowances had thus arrived. Plaintiffs' applications, filed in March 1974 (A. 90, 109), were granted on June 26, 1974 (A. 165).

Petitioners assert, without any support in the record, that three "appeals" are still pending (Pet. 17-18). Since the proceedings referred to are captioned in the District Court for New Jersey (*ibid.*), they can hardly constitute "appeals" from the judgment approving the settlement of the present action in the Southern District of New York.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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